

Exhibit A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

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SONY MUSIC ENTERTAINMENT, et al.,: :
Plaintiffs, : :
-vs- : Case No. 1:18-cv-950
COX COMMUNICATIONS, INC., et al.,: :
Defendants. : :
-----:

HEARING ON MOTIONS

February 15, 2019

Before: John F. Anderson, U.S. Mag. Judge

APPEARANCES:

Matthew J. Oppenheim, Scott A. Zebrak, and Jeffrey M. Gould,
Counsel for the Plaintiffs

Thomas M. Buchanan and Jennifer A. Golinveaux,
Counsel for the Defendants

1 there is a lot of work involved. And we don't think it's
2 relevant. And so, we think that's a fair compromise.

3 In terms of the unique number, the ICOMS number, they
4 suggest now, even though we've had discussions before about
5 using a separate number to protect the identity of the
6 customers --

7 THE COURT: Well, what -- giving them the ICOMS
8 number doesn't give anybody the identity of anybody. I mean,
9 that is a number that if I looked at, I would have no idea who
10 that relates to, right?

11 MR. BUCHANAN: Correct, on its face. But our client
12 tells us that that number can be utilized to track the identity
13 of the customer, and that's what --

14 THE COURT: Well, an IP address can be used to do
15 that too, right?

16 MR. BUCHANAN: Not as easily according to our client.
17 But that's what they've advised us, Your Honor. That's the
18 only reason.

19 It's not to frustrate the effort of the plaintiffs.
20 It's just something we believe is necessary to protect our
21 customers' identity or to make it as safe as possible.

22 And we don't think it's really relevant because we
23 don't think these ICOMS numbers are floating around in a lot of
24 e-mails by which they have got to connect the e-mails to this.

25 I mean, the whole issue here is really they wanted

1 numbers. They want to show that they had 58,000 subscribers to
2 whom they sent notices about and 168,000 notices. Now they
3 want more notices to try to show they all equate with
4 infringement, and they put us on notice, to enhance their
5 damages.

6 So this number is not really relevant. It's just
7 that they want to create a chart with all these numbers.

8 THE COURT: Well, it's more work for you to have to
9 do something to replace that number; is that right?

10 MR. BUCHANAN: I don't think it is because we're
11 going to create a different type of formatted screen shot. And
12 so, it would just leave that off.

13 Again, we would have no problem with giving it if we
14 didn't think it was an issue and if we thought it was really
15 relevant. I don't see this notion that this number is going to
16 connect them to all these e-mails and they will be able to
17 depose people about Joe Jones who infringed in 2013 and 2014
18 and '12 on their copyrights and then on some other copyrights.
19 I just don't think there is e-mails out there that are
20 like that. So --

21 THE COURT: All right. Let me -- what is the purpose
22 of you needing to have the ICOMS number as opposed to just some
23 unique identifier that you know that, you know, that relates to
24 this issue with this IP address, or whatever?

25 MR. ZEBRAK: Yes, Your Honor. I would like to answer

1 that, and also respond to a couple of other things very
2 briefly.

3 So I think the starting point should be on Cox to
4 justify why it needs to change the number. From our
5 perspective, the reason we want the number is that's how it's
6 records exist in the normal course. E-mail May cite to it.

7 And more importantly, when we work with witnesses in
8 depositions, they're not going to understand some unique number
9 that Winston & Strawn assigns to this. They will understand --
10 they will understand an ICOMS field.

11 And when we put a witness on the stand at trial,
12 we're going to walk through the interrelatedness of the revenue
13 information from its financial database with the notice data
14 from its CATS database.

15 And the idea that somehow this could be used to
16 identify a subscriber is really just preposterous. It's an
17 internal database ID number within Cox. It's not the
18 customer's account number on their billing statement. This is
19 just an internal unique serial number they have ascribed to a
20 subscriber for purposes of cross-referencing things internally.

21 So -- and there is no declaration in the Court about
22 risks of disclosure of someone's personal identity from this.

23 THE COURT: Well, no, there is some information about
24 their being concerned about the personal identifying
25 information being included. But I understand your argument.

1 MR. ZEBRAK: Yes, Your Honor. And that, of course,
2 that information though is about what could be subsumed within
3 the tickets. It has nothing to do with the personal nature of
4 an ICOMS ID.

5 And Cox's counsel just mentioned that there is some
6 burden involved here. There is no articulated burden in
7 producing a summary level information, nor any burden involved
8 in going back to 2011 versus '12.

9 And as Your Honor seized on already, their changing
10 normal course by assigning a proxy number to it that, you
11 know -- that only creates more work. So ...

12 THE COURT: All right. Okay. For item number 3, I
13 am going to go ahead --

14 MR. ZEBRAK: Oh. And, Your Honor, the only other
15 thing I would like to say on this, if we could, is at the last
16 hearing plaintiffs were required by Court order to produce
17 historical revenue data on its tracks at issue in the case
18 going back to 2011.

19 So there seems to be sort of a parallel that we would
20 like to keep consistent.

21 THE COURT: Well, revenue data and complaints are
22 apples and oranges.

23 MR. ZEBRAK: Yes, Your Honor.

24 THE COURT: Okay. Anything else?

25 MR. ZEBRAK: No, Your Honor.

1 THE COURT: All right. On item number 3, I'm going
2 to require that they produce the information with the ICOMS ID.
3 And that the time period will be 2012 through 2014.

4 Okay. So that takes care of item number 3.

5 Do you want to go 1 or 2 next? Which --

6 MR. ZEBRAK: Yes, Your Honor.

7 THE COURT: Let's do the revenue one.

8 MR. ZEBRAK: Yes, Your Honor. So as I mentioned a
9 little while ago, the case, of course, is about Cox's continued
10 provision of service to subscribers it knew were engaged in
11 infringement. And what we want to be able to do is to
12 correlate what Cox knew about those subscribers' infringement
13 along with Cox's receipt of revenues from those infringers.

14 And here Cox has -- you know, it's unclear, quite
15 frankly, put in declarations that we think -- you know, the
16 purpose of a declaration is, of course, to clarify and put the
17 parties and the Court in a position to resolve the dispute. We
18 think that these declarations were more designed to just oppose
19 the discovery rather than clarify what they have and how they
20 have it.

21 But whether they call it revenue information or
22 billing information, you know, Cox knows what its subscribers
23 paid to it over time.

24 THE COURT: Well, it knows what it billed, and at
25 least it is indicating that it can track or it is contained in

1 the ICOMS system what was billed. And whether they don't
2 collect on their bills or not, I don't know. But, you know,
3 apparently they are trying to mistake a distinction as to what
4 was billed and what are revenues.

5 MR. ZEBRAK: Yes, Your Honor. But if I could expound
6 on that slightly because I think it's a little more refined
7 than that based on how they briefed it.

8 So on the one hand they say, we don't track or
9 maintain revenue information in this ICOMS database. At the
10 same time they say, I don't have the exact words in front of
11 me, but what we have here, we don't maintain complete revenue
12 information. And that database lacks info next for accurately
13 calculating revenue.

14 THE COURT: Does it make any real difference to you
15 whether it's billing information or revenue information? We're
16 not getting down to, you know, nickels and dimes here.

17 MR. ZEBRAK: Of course, Your Honor. Of course, Your
18 Honor.

19 THE COURT: And if somebody didn't pay their bill one
20 month and they paid it the next month, and they maybe had to
21 have an interest charge or something --

22 MR. ZEBRAK: Yes, Your Honor, right.

23 THE COURT: This is not going to get into the
24 granular nature of those kinds of things.

25 MR. ZEBRAK: Right. Right. Well, come at trial they

1 no doubt will attack us for our experts and our use with their
2 witnesses. And when we try and calculate the sum total of what
3 Cox received from these subscribers that it knew were engaged
4 in infringement, it no doubt is going to try to beat us up
5 saying it doesn't accurately reflect what it received.

6 But on the billing information, it does say that the
7 ledger side of that system includes not just what it billed,
8 but also information about accounts receivable and credits.

9 So it's unclear to us the nomenclature they're using
10 about -- about revenue versus billing. And if they want to
11 produce billing information instead of revenue information, if
12 they'll -- if they'll stipulate right now that they won't at a
13 trial say that what they actually received is less than what
14 the system reflects on billing, that's fine with us.

15 You know, but the bottom line is, it knows who these
16 subscribers are. It has information on how it benefitted from
17 these subscribers financially.

18 And, you know, the information, Cox says it's only of
19 marginal relevance. Nothing could be further from the truth
20 than that. I mean, this goes squarely at a number of core
21 issues in the case.

22 You know, there is a difference between us and Cox's
23 counsel in our views of how to prove the financial interest
24 prong of vicarious infringement. We think when it decides to
25 keep a subscriber rather than terminating it, obviously all

1 that ill-gotten revenue after that is a direct financial
2 benefit.

3 But without even delving into that issue, which is a
4 little more legally dense, Cox has no argument against why the
5 information we seek isn't super-strongly relevant to the
6 statutory damages issues of Cox's profits as well as Cox's --
7 you know, the need to deter Cox.

8 And we need to see not just the aggregate Cox got
9 from these subscribers it knew was infringement, but then
10 correlate it against its decisions not to terminate them.
11 That's incredibly powerful evidence, and it's why Cox really
12 doesn't -- doesn't want to produce that.

13 And quite frankly, it cites -- you know, it goes on
14 in its declarations about the costs of doing it manually. But
15 we're not interested in them doing this manually. Just as
16 plaintiffs are required to do in response to a number of
17 discovery requests, we're running reports to figure out how to
18 pull information out. And in the context of this case and
19 these issues, \$15,000 is something that the parties are
20 routinely absorbing.

21 So, you know, again, we just think it's very
22 relevant. It's all in one database, and we would like it
23 produced. And we would like them, if they are not going to
24 produce revenue information, which we don't think they have
25 articulated that they lack, we would like them to produce at

1 least this billing information and be held to -- be held to
2 the proposition of that's what it received in revenue.

3 THE COURT: Okay.

4 MR. ZEBRAK: Thank you, Your Honor.

5 THE COURT: Thank you.

6 First help me understand the difference between the
7 billing and the revenue argument.

8 MS. GOLINVEAUX: Yes, Your Honor. So ICOMS is Cox's
9 subscriber management system. The records that the plaintiffs
10 are seeking, this is not the kind of report that Cox could run.
11 It doesn't track revenue on a per subscriber basis. So it
12 doesn't have a business need to run that type of report in the
13 ordinary course.

14 So as is described in the Jarchow declaration, this
15 would require, to do this in an automated way -- automated way,
16 hiring an outside engineer to come in and write code to create
17 this special report they are seeking --

18 THE COURT: I mean, you have got the information,
19 it's just how are you going to access it. Okay.

20 So what I'm trying to find out is, you know, what's
21 the word game between billing and revenue? I mean, if I called
22 Cox up right now and if I had a Cox account and I gave them my
23 account number, they could pull up something that had, I
24 assume, my billing information that would include what was I
25 billed and whether those bills were paid, right?

1 MS. GOLINVEAUX: Your Honor, there is, as described
2 in the declaration, there is the ledger section of ICOMS.

3 THE COURT: Right.

4 MS. GOLINVEAUX: And it does contain, in addition to
5 the amount billed, certain account receivable information, like
6 debits and credits.

7 And my understanding is that to create the report
8 that processed all that in a meaningful way to show what was
9 actually paid versus what was billed, is a more complicated
10 process and more involved process.

11 THE COURT: Is there any generic information as to
12 Cox receives 98 percent of its billings? I mean, if this is a
13 situation where you're going to try and make some, you know,
14 cute argument that they were only billed and that doesn't
15 indicate what we actually got as revenues, I want them to have
16 some generic information they can use to say, okay, they only
17 gave us the billing information, but historically Cox, you
18 know, gets money in the door for 98 percent of its billings, or
19 90 percent of its billings, or whatever it actually -- the
20 realization rate for its billings for subscribers.

21 Is there that kind of information available?

22 MS. GOLINVEAUX: For the time period at issue, Your
23 Honor, I am just not sure if they have that, that information
24 about percentages of dollars they collect off of the billing
25 information. Off the bills, the amounts billed.

1 THE COURT: Well, that's the kind of information that
2 you would think would routinely be looked at and analyzed by
3 the business people within the organization, wouldn't it?

4 MS. GOLINVEAUX: It certainly may, Your Honor.

5 THE COURT: Okay. All right. So the billing
6 information, help me understand what the situation is with
7 that. You have to pay somebody \$15,000 to prepare some type of
8 script or program or program to run to get this information
9 from the database that you have maintained. Okay?

10 MS. GOLINVEAUX: That's correct, Your Honor. And we
11 think that -- counsel talked about the relevance of this
12 information. We think that they are just wrong about the
13 vicarious liability issue. Vicarious liability requires right,
14 ability to control, and a direct financial benefit.

15 There is no dispute that Cox bills for its services,
16 its Internet service. The amount it billed to each of these
17 58,000 subscribers is not relevant to the direct financial
18 benefit prong of vicarious.

19 And in light of the marginal relevance and the fact
20 that Cox cannot create these reports in the ordinary course and
21 is going to have to hire an engineer to go in and write a
22 script to extract it, we think it's not appropriate.

23 THE COURT: Okay. What about the time period, your
24 argument on that.

25 MS. GOLINVEAUX: Your Honor, they're asking for the

1 information for more than eight years, from 2011 to the
2 present. If Your Honor is inclined to order it, we think that
3 the claims period is the relevant time period. They're saying
4 it's relevant to damages. What Cox billed these subscribers
5 before or after their claims period can't possibly be relevant
6 to statutory damages or actual damages.

7 THE COURT: Well, why wouldn't -- if in fact you
8 should have terminated a customer in let's say January of 2014
9 based on, you know, 13 or 14 or 15 different complaints. And,
10 you know, you decided that, you know, we need to keep every
11 customer. And, you know, that customer is continuing to pay
12 Cox money now, why wouldn't that, to some extent, come into
13 play as to, you know, it was important for you not to terminate
14 this customer because you wanted that revenue stream going in
15 the future?

16 MS. GOLINVEAUX: Well, Your Honor, that can't
17 possibly be relevant to damages. They can't seek -- they can't
18 show --

19 THE COURT: Why wouldn't it go to willfulness? My
20 willful act so that I could get this revenue stream for four or
21 five more years, or whatever the standard industry rate is
22 that, you know, somebody doesn't change their Internet service
23 or these kinds of providers, why doesn't that come into play as
24 to willfulness?

25 MS. GOLINVEAUX: Because, Your Honor the standard for

1 willfulness is whether Cox was aware that its actions with
2 respect to the plaintiffs' works constituted infringement. And
3 whether it was receiving revenue from these subscribers at
4 issue years before or years after the claims period is not
5 relevant to that inquiry.

6 THE COURT: Okay. The script that would be written
7 to do this, would it produce -- I mean, you made some comment
8 about you only have this monthly. Would this be monthly
9 information, or quarterly information, or what's the process
10 that you would anticipate that information being generated?

11 MS. GOLINVEAUX: If the -- if we're writing a script,
12 I think it could be either monthly or annually because the
13 script could roll it up by year.

14 THE COURT: Okay. All right. Let me hear from the
15 plaintiff about the time period information and whether yearly
16 or -- I assume you would want it -- you want it quarterly and
17 yearly. I don't -- I am not sure why if you got it quarterly,
18 why you would need it to be quarterly and yearly.

19 But I assume you would want it on a monthly basis as
20 opposed to a yearly basis; is that right?

21 MR. ZEBRAK: Yes, Your Honor. Given that it's just
22 pulling it out of a database, it's -- it will be more useful at
23 a trial for us to be able to slice and dice the data different
24 ways. And if it just wants to give us a report giving --
25 giving the data monthly, that's absolutely fine with us.

1 Your Honor, there are several statements I would like
2 to respond to, but if Your Honor is already inclined to find
3 that the information is relevant, I won't need to speak to
4 that.

5 THE COURT: Well, the time period I do need to hear
6 you.

7 MR. ZEBRAK: Yes, Your Honor.

8 THE COURT: And I can understand why a brief,
9 historical time period might be appropriate, just to know if,
10 you know, whether this was a new big customer or a long-term
11 big customer, whatever.

12 MR. ZEBRAK: Yes, Your Honor.

13 THE COURT: But I'm still a little unsure as to how
14 significant the amount is to the present as opposed to whether
15 that customer continued for a year, or two years, or something
16 like that.

17 MR. ZEBRAK: Yes.

18 THE COURT: So why is the information going to, you
19 know, the present time significant?

20 MR. ZEBRAK: Yes, Your Honor. So to be clear, there
21 are two issues on the time period. There is the claims period,
22 and then there is the before and the after.

23 THE COURT: Right, right.

24 MR. ZEBRAK: But I will begin with the after, as Your
25 Honor asked.

1 THE COURT: Okay.

2 MR. ZEBRAK: So in terms of Cox's profits, and sort
3 of ill-gotten gains from continuing to provide service to these
4 subscribers it knew was engaging in infringement, obviously
5 however much money it kept receiving, you know, those
6 ill-gotten gains didn't stop at the end of our claims period.

7 You know, had it terminated that subscriber -- I
8 mean, Cox is free to make whatever arguments it wants to make
9 at a trial about our use of the revenue information being too
10 expansive or not. That really is a question for trial.

11 But if, you know, if Cox didn't terminate a customer,
12 and then that customer continued for another two years, or
13 continued to the present day, that's all ill-gotten revenue
14 that Cox shouldn't have received, and speaks to its profits, as
15 well as the need to deter Cox --

16 THE COURT: Well, revenue and profits are two
17 different things.

18 MR. ZEBRAK: Yes, Your Honor.

19 THE COURT: And, you know -- and I'm -- well, keep
20 going.

21 MR. ZEBRAK: Well -- no, sure. And it's certainly
22 entitled to come in and try and say, here is what we actually
23 made on these subscribers, not the gross receipts.

24 But even putting aside whether -- how you prove
25 profits and the interaction between offsetting revenue with

1 costs, just the need to deter Cox, it's incredibly powerful
2 if -- you know, it shows -- you know, what Cox wants to do is
3 just produce the raw aggregate amount of money it made from
4 certain division of its business. And then come at trial it's
5 going to say, that's overbroad because it includes lots of
6 subscribers who never infringed.

7 And what we want to do is just have the information
8 showing how Cox received moneys from these subscribers it knew
9 was engaging in infringement but chose to keep them.

10 And so, you know, we just think -- you know, going
11 back earlier than the claims period, given Your Honor's ruling
12 on the notice data being just 2012 rather than 2011, having it
13 coterminous with that, you know, makes sense in terms of 2012
14 rather than going back to '11 because we can then see, okay,
15 here is a subscriber, John Smith, here is what Cox was getting.
16 It knew he was engaged in infringement, but yet Cox kept
17 providing service. And look at how the revenues kept growing,
18 maybe through to today.

19 And so, our experts, you know, might produce a report
20 that calculates that.

21 I mean, the reason why they're fighting this so hard
22 is because it's incredibly probative. And there is no
23 additional burden -- you know, they're running a report to pull
24 data from a database, and once they're doing that, I mean, I
25 think the relevance is clear.

1 THE COURT: Well, a monthly report for 58,000
2 customers for additional years, you know, takes computer time
3 to do that. I am not sure how much computer time.

4 MR. ZEBRAK: Yeah.

5 THE COURT: But, I mean, it generates a lot of
6 information that then -- does that really bear any significant
7 benefit to the parties in having what was -- you know, what
8 this customer was billed in 2017 when you're talking about an
9 infringement period that ended in 2014.

10 MR. ZEBRAK: Yeah. I mean, I just think, you know,
11 when a -- look, if a company terminates my account with them, I
12 am less likely to probably sign up with them again.

13 And the bottom line is, this is all revenue Cox
14 wouldn't receive. It can make its arguments at trial, it can
15 have its experts make its argument, but all this revenue -- I
16 mean, what Cox wants to do is to say, look, this was a limited
17 period of bad behavior at our company. And it wants to try and
18 cabin everything into just this claim period.

19 And it wants to, you know, just produce its -- again,
20 its overall data and not allow us to focus on the moneys it
21 received from these bad subscribers. And in the context of
22 this case, running a report on just -- you know, revenues from
23 these subscribers, really just isn't -- isn't that demanding.

24 THE COURT: Okay. All right. Well, I think I
25 understand what the issues are there.

1 I do think -- you know, I can appreciate the
2 defendants' argument that they don't agree this information is
3 relevant. And whether it makes its way into the trial of this
4 case will be something for Judge O'Grady to decide. But I do
5 think at this point in time it is discoverable information.

6 And it is discoverable information that is available
7 to Cox. The method that they maintain it, if it makes it
8 difficult for them to gather that information, that still
9 doesn't make it not relevant information.

10 And the idea that it's going to cost \$15,000 doesn't
11 overwhelm me, to be honest with you. Given the nature of this
12 case and the amount that is being spent to litigate this case,
13 that doesn't really impact me on the proportionality argument.
14 That, you know, that kind of investment to get relevant
15 information to produce in this case doesn't tip the scales.

16 So I am going to require that revenue information
17 attributable -- well, that billing information, yes,
18 attributable to each subscriber for the time period from 2012
19 through 2016. That gives you one year early during the period,
20 a five-year period. I think that gives you at least a point
21 for your experts to look at to see, to generate, you know -- I
22 assume your experts are going to also then, you know, not only
23 try to do what they have gotten to date, but what will be going
24 in the future. And this is -- that's enough information for
25 them to deal with.

1 It needs to be done on a monthly basis. So that
2 needs to be generated on a monthly basis. So it will be from
3 -- a monthly basis from 2012 to 2016.

4 I also want you to investigate and find out whether
5 there is available information concerning the realization rates
6 on billing information for that time period from 2012 through
7 2016.

8 So that, you know, we don't get into this, you know,
9 that was only what was billed, it wasn't really what was
10 received. That there can be some general correlation as to
11 billing and actual receipts from the company since you've
12 indicated or represented to the Court that the revenue
13 information is much more difficult to obtain. Okay.

14 All right, issue 2. You need to help me understand
15 what it is really is you're asking for on this. Because, you
16 know, if we're talking about every communication dealing with
17 every infringement, that's not going to win any argument.

18 MR. ZEBRAK: Yes, sir.

19 THE COURT: And so, I mean, it's a little unclear to
20 me -- and, you know, it's difficult to order something that's
21 unclear because I don't want to put the other side in a
22 position of coming back and not knowing what it is I'm
23 requiring them to do. So that you come back and say, they
24 didn't do what you told them to do, and we have to come back in
25 and say, I interpreted it as this, I interpreted it as that.